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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF *AMICUS CURIAE* IDENTITY AND INTEREST	1
INTRODUCTION	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. CONGRESS DID NOT INTEND THE NSR PROGRAM TO THREATEN ALL EXISTING FACILITIES WITH A "SUBMIT OR SHUT DOWN" ULTIMATUM UPON EXPIRATION OF SOME UNWRITTEN "GRACE PERIOD" OR "GRANDFATHERING."	5
A. The Clean Air Act's Deliberate Scheme	5
B. Controlling New and Existing Sources	7
1. Addressing New Sources	8
2. Controlling Existing Sources	10
3. NSR was deliberately designed to address growth	14
4. In the 1990 Clean Air Act Amendments, Congress reaffirmed previous regulatory choices, and strengthened controls on existing sources, without altering NSR's role in the hierarchy	15
C. Grandfathering in the Clean Air Act; Congress did not play Petitioners' argued "expectations" game	16

TABLE OF CONTENTS—Continued

Page

II. THE NEW SOURCE PROGRAMS MODIFICATION RULE APPLIES ONLY TO EXISTING SOURCE CHANGES THAT CREATE NEW AND UNREGULATED POLLUTION 19

A. The Modification Rule focuses on new emissions capacity 20

B. NSPS and NSR are closely related programs sharing common features, including the same definition of "Modification." 21

1. Congress deliberately defined NSR modification by references to NSPS modification 21

2. NSPS and NSSR share overlapping regulatory goals 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES — Page

Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979) 18, 25, 26
General Motors Corp. v. United States, 496 U.S. 530 (1990) 6
IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005) 23
New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) 10
Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989) 21
Sullivan v. Stroop, 496 U.S. 478, 484 (1990) 22
Union Elec. Co. v. EPA, 427 U.S. 246 (1976) 6
United States v. Alabama Power Co., (N.D. Ala.; Case No. 2:01-cv-00152-VEH (Memorandum Opinion, Aug. 14, 2006)) 5
United States v. Cinergy Corp., No. 06-1224 (7th Cir. 2006) 23
Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 6
Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) 19

STATUTES

42 U.S.C. § 7401(a)(3) 6
42 U.S.C. § 7401(b)(1) 14
42 U.S.C. § 7409 6
42 U.S.C. § 7410 6
42 U.S.C. § 7410(a)(2)(D), (a)(4) 23
42 U.S.C. § 7411(a)(4) 20
42 U.S.C. § 7412(i)(3) 17
42 U.S.C. § 7470 14
42 U.S.C. § 7470(3) 15
42 U.S.C. § 7479(4) 25
42 U.S.C. §§ 7491(b)(2)(A) 11
42 U.S.C. § 7501(1) 11

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 7501(4)	9, 20, 22
42 U.S.C. § 7502(c)	11
42 U.S.C. §§ 7651(a)(28)-(29), 7651(b)	15
42 U.S.C. § 7651(b)	16
REGULATIONS	
40 C.F.R. §§ 51.166(b)(2)(iii); 60.14(e)(3)	25
40 C.F.R. § 52.21(d)(21)(ii)	25
OTHER SOURCES	
116 Cong. Rec. 42,520 (1970)	9
116 Cong. Rec. 19,206 (1970)	9
116 Cong. Rec. 33,115 (1970)	17
123 Cong. Rec. 18,019 (1977)	12
123 Cong. Rec. 18,021 (1977)	20
123 Cong. Rec. 18,040 (1977)	21
123 Cong. Rec. 18,022 (1977)	22
Environmental Policy Division (1978), Library of Congress, 95th Cong., 2nd Sess., A Legislative History of the Clean Air Act Amendments of 1977: a Continuation of the Clean Air Act Amendments of 1970 (1978), Washington, DC: US Senate Committee on Environment and Public Works Print	12
H.R. Rep. No. 91-1146 (1970)	8, 20
H.R. Rep. No. 95-294 (1977)	11, 14, 22
H.R.4567, 99th Cong. (1986)	12
H.R.5555, 97th Cong. (1982)	12
Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685-86 (1970)	17
S. Rep. No. 91-1196 (1970)	10
S. Rep. No. 95-127 (1977)	20, 21
S.321, 100th Cong. (1987)	12

TABLE OF AUTHORITIES—Continued

	Page
S.316, 100th Cong. (1987)	12
S.300, 100th Cong. (1987)	12
S.2813, 99th Cong. (1986)	12
S.2203, 99th Cong. (1986)	12
S.2200, 99th Cong. (1986)	12
S.52, 99th Cong. (1985)	12
Sen. George Voinovich, Chairman, Senate Subcommittee on Clean Air, Climate Change and Nuclear, "*The Clean Air Act's New Source Review Program: A Policy in Desperate Need of Reform.*"	8
FEDERAL REGISTER	
39 Fed. Reg. 36,946 (Oct. 15, 1974)	19
39 Fed. Reg. 42,510 (Dec. 5, 1974)	9, 22
39 Fed. Reg. 42,512 (Dec. 5, 1974)	22
39 Fed. Reg. 42,513 (Dec. 5, 1974)	22
40 Fed. Reg. 58,416 (Dec. 16, 1975)	13
41 Fed. Reg. 55,524 (Dec. 21, 1976)	9
45 Fed. Reg. 52,677 (Aug. 7, 1980)	26
45 Fed. Reg. 52,691-92 (Aug. 7, 1980)	24
45 Fed. Reg. 52,704 (Aug. 7, 1980)	27
68 Fed. Reg. 61,248, 61,273 (Oct. 27 2003)	10
68 Fed. Reg. 61,248, 61,268 (Oct. 27, 2003)	10
68 Fed. Reg. 61,253 (Oct. 27, 2003)	27
69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004)	14

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BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

STATEMENT OF *AMICUS CURAE* IDENTITY AND INTEREST[1]

Current and former Members of Congress Waxman, Markey, Rooney, Maguire, Ottinger, Moffett, and Anderson ("Waxman, *et al.* Amici") have filed *amicus curiae* brief in this case. U.S. Representative Joe L. Barton files this amicus brief in response as well as to correct inaccurate representations by Petitioners of Congress' intent. Representative

[1] Pursuant to Supreme Court Rules 37.3 and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief; (2) no counsel for any party authored this brief either in whole or in part; and (3) no person or entity other than the above-named *amici* curiae and their counsel made any monetary contribution to its preparation or submission.

Barton participated in the lengthy legislative debates and discussions that led to the 1990 amendments to the Clean Air Act ("CAA" or the "Act") and, as Chairman of the House Committee on Energy and Commerce with oversight responsibility over the CAA, has a unique interest in ensuring that the Act is properly construed and implemented.

INTRODUCTION

Chairman Barton respectfully requests that this Court take note that the conclusion advanced by Petitioners and Amici Waxman, *et al.* (hereinafter, "Petitioners") in *Environmental Defense, et al., v. Duke Energy Corp., et al.*—that the Act's New Source Review program was intended to serve as an omnibus pollution control regime ultimately applicable to all existing sources electing to continue in operation—is wrong for several particular and compelling reasons made quite clear by the Act's history, language and implementation.

First, Congress never intended New Source Review as even a principal vehicle for achieving pollution control from existing sources. Had Congress intended such an outcome it would have said so, as revealed by the Act's very deliberate construction. Instead, Congress intentionally created a regulatory regime where existing sources of pollution were principally regulated by the individual states. Moreover, as the program's name implies, Congress intended New Source Review to address new sources of otherwise unregulated pollution—that is, newly constructed sources or those that undergo "modification" expanding their capacity to emit.

The Act's history is replete with clear illustrations that the counterintuitive reading advanced by Petitioners was not in fact Congress' intent. Unavoidable among these is that the radical policy shift Petitioners advocate would also make numerous, significant Clean Air Act regulatory programs superfluous. Further, Congress expressly addressed and re-

jected Petitioners' suggested policy both in the 1977 and 1990 CAA amendments.

Specifically, therefore, the Fourth Circuit accurately determined that EPA's 1980 "modification" rule must be consistent with Congress' view that neither the New Source Review program ("NSR") nor the New Source Performance Standards Program ("NSPS") (hereinafter, "New Source Programs") were intended to be the primary regulatory mechanism for reducing pollution from existing sources.

SUMMARY OF THE ARGUMENT

Statutory language and history make clear that in enacting and amending the Clean Air Act, Congress rejected the concept of demanding universal, immediate and across-the-board pollution reductions through the mandatory retrofit of new source pollution control technologies. Instead, from the Act's inception, to achieve its goal of reducing air pollution to protect public health with an adequate margin of safety Congress adopted a system of pollutant-specific National Ambient Air Quality Standards ("NAAQS"), subject to periodic review and revision by EPA consistent with the latest available scientific and technical data. Each area throughout the United States was required to meet the NAAQS, with primary responsibility for NAAQS compliance and maintenance expressly with the States.

Contrary to Petitioners' arguments, NSR was not intended to confront utilities or any other major stationary sources with an option of either shutting down or retrofitting new advanced pollution controls within a specified period of time. Unlike other CAA control regimes, Congress did not intend the New Source Programs to reduce emissions from existing sources operating in accordance with their original design capacity; pollution from existing sources is already fully accounted for by the relevant air quality plans. Instead, New Source Programs were to control new emissions growth, that

is, newly constructed facilities or existing facilities undergoing construction to expand their capacity to emit ("modification"). Emissions from existing facilities not so "modified" remain within the discretion and purview of the individual States to devise and implement actions to attain the NAAQS, subject to EPA approval, as provided in the 1970 and 1977 CAA Amendments.

Neither the Act's statutory language nor legislative history indicate any intention by Congress that New Source Programs be triggered by activities that accomplish nothing more than enabling a facility to operate as constructed and within permitted limits. Nor do New Source Programs otherwise disrupt Congress' deliberately constructed hierarchy of Clean Air Act regulatory programs for obtaining emission reductions from existing sources, with NSR created to respond to activities adding new pollution for which States had not previously accounted in their role as primary regulatory authority over existing facility emissions.

Construing the term "modification" to include "the most mundane activities" at existing sources, *irrespective of whether they actually create new pollution*, requires believing that Congress intended to make redundant and/or obsolete other regulatory programs it went to great effort and detail to enact, and that Congress intended to drive the entire emission inventory attributable to the operations of major stationary sources down to the lowest, technologically feasible levels within a relatively short window of time. The structure and entire legislative history of the Act defy this conclusion.

Petitioners' view of NSR begs the question why Congress bothered to enact the highly complex CAA programs, such as the landmark Title IV acid rain provisions and elaborate Title I reasonable further progress ("RFP") provisions designed to independently achieve NAAQS attainment, which Petitioners would make redundant and unnecessary. This outcome defies credulity and all available evidence, seeking to institute

"regulation by litigation instead of by notice and comment rulemaking." *See United States v. Alabama Power Co.*, (N.D. Ala.; Case No. 2:01-cv-00152-VEH (Memorandum Opinion, Aug. 14, 2006)).

Congress developed an extensive hearing record, in the years-long debate over the 1990 Amendments, to assess the sufficiency of extant programs including NSR and NSPS to attain the large additional reductions in key air pollutants necessary to address acid rain. Congress concluded and plainly articulated that NSR was neither capable of securing nor designed to secure emission reductions from existing sources.

Construing the NSR provisions established by the CAA Amendments of 1977 as Petitioners request would therefore ignore this history and also strip the subsequently enacted 1990 Amendments of any discernible meaning. It is axiomatic that such a construction defies congressional intent, specifically as reflected in at least the major 1977 and 1990 CAA revisions. This Court should therefore reject Petitioners' construction of the Act and the 1980 NSR regulations.

ARGUMENT

I. CONGRESS DID NOT INTEND THE NSR PROGRAM TO THREATEN ALL EXISTING FACILITIES WITH A "SUBMIT OR SHUT DOWN" ULTIMATUM UPON EXPIRATION OF SOME UNWRITTEN "GRACE PERIOD" OR "GRANDFATHERING."

A. The Clean Air Act's Deliberate Scheme.

Congress deliberately titled its "New Source" Programs as such because these Programs were intended to cover new facilities, that is, new and otherwise unregulated *capacity* to pollute, or "new sources." These include existing sources that are "modified" to create new pollution not yet regulated

under the CAA programs applying to existing sources of pollution, thereby protecting public health and welfare. The Act's evolution clearly and obviously reveals this scheme.

While Congress, through its 1970 Clean Air Act amendments, introduced a federal requirement for States to comply with the National Ambient Air Quality Standards ("NAAQS"), *see* 42 U.S.C. § 7409, Congress also reserved "primary responsibility" for the States to attain and maintain NAAQS, *see* 42 U.S.C. § 7401(a)(3); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasizing that Clean Air Act section 110 left to the States "the power to determine which sources would be burdened by regulations and to what extent"). This hierarchy reflects Congress' considered judgment that State governments better understand local needs and circumstances and are thus best able to craft appropriately tailored programs to improve air quality. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470-71 (2001); *id.* at 493 (Breyer, J., concurring in part and concurring in the judgment); *General Motors Corp. v. United States*, 496 U.S. 530, 532-33 (1990).

This same conclusion—that States are better suited to determine local conditions, needs and solutions—informed Congress' decision to leave to the States with discretion over what specific retrofit measures were needed to attain the NAAQS. Thus, each State's individual State Implementation Plan or "SIP" articulates how best to achieve the Clean Air Act's air quality goals through emission reductions and controls from sources within each State's border. *See* 42 U.S.C. § 7410. In that SIP, the State calculates an attainment-level "emissions budget," comparing it with the existing and projected base-line "business as usual" emissions level. The State is thus able to determine the required aggregate emission reductions, and to assign detailed emissions limitations to existing sources to achieve this required quantity of reductions.

It is noteworthy that Congress did assert federal primacy for regulating particular categories of pollution. These national programs generally focus on sources that individual States are unable to control such as automobiles and other mobile source standards. This reinforces State primacy over pollution sources they can control such as large stationary sources. The interpretation of the NSR program that Petitioners advance, by contrast, both subverts the State's regulatory primacy in this area and significantly revises the CAA's scheme by abandoning the concept of State discretion over how to regulate existing sources to attain the NAAQS.

Finally, it is important to note that existing facility emissions from sources operating as constructed and permitted to operate and not installing or creating new capacity ensure attainment, and are, therefore, by definition not "increas[ing] pollution." In establishing individual source emissions limits, States assume the *maximum potential* emissions from each existing source—based on around-the-clock operations, unless otherwise limited by an enforceable permit term. A State must demonstrate that with the controls implemented for each source it will attain the standard for the relevant criteria pollutant by the required attainment date, even with all sources operating at maximum capacity. As a result, the relevant SIP already takes into account all the existing air pollution capacity in a way designed to attain and maintain the NAAQS. There is, therefore, no new pollution capacity created by a source that repairs a broken or failing component so that the source can continue to operate as it was constructed and permitted by the State to operate, and then continues to operate in subsequent years in accordance with the SIP and its Clean Air Act permits.

B. Controlling New and Existing Sources.

NSR has always been focused on regulating new capacity to pollute, that is, on managing new growth. It was never

about obtaining additional reductions from existing facilities as Petitioners advance. Such a result would blur and indeed obviate Congress' clearly drawn lines. What Petitioners actually seek is judicial implementation of a 1997 internal enforcement policy memo to impose this radical policy change[2]—eviscerating major programs specifically designed to regulate precisely those sources.

1. *Addressing New Sources.*

Although State-level SIP actions are the principal Clean Air Act mechanism to achieve NAAQS compliance, Congress also envisioned several CAA regulatory measures directed exclusively at new sources. Congressional considerations in adopting those new source provisions included avoiding industrial relocation, or "forum shopping," which Congress addressed by calling upon new sources to install advanced pollution controls, irrespective of the local air quality needs, again while reserving primacy over existing sources to the States. H.R. Rep. No. 91-1146, at 3 (1970). Despite this and select other new source-specific regulatory programs, Congress was clear that the NSPS was a narrow departure from the overall State primacy in abating air pollution.

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[2] See, *e.g.*, "[A] 1997 enforcement memorandum leaked to the media . . . shows EPA's desire to force additional reductions in emissions by arbitrarily revising enforcement practices instead of the more appropriate regulatory process complete with its public comment and review requirements. In 1998, the EPA changed enforcement practices when they renounced the 1992 NSR interpretation in a proposed rule calling parts of the WEPCO decision a departure from Agency policy which should not be continued. . . . Finally, in 1999, the EPA filed NSR lawsuits against seven electric utility companies and an administrative enforcement order against the Tennessee Valley Authority, alleging NSR modification violations at 24 different facilities, reaching back as many as 22 years." Sen. George Voinovich, Chairman, Senate Subcommittee on Clean Air, Climate Change and Nuclear, "*The Clean Air Act's New Source Review Program: A Policy in Desperate Need of Reform,*" found at http://voinovich.senate.gov/policy_paper/nsr_whitepaper.pdf.

Numerous Members of Congress instrumental in the 1970 CAA amendments elaborated on this State/federal hierarchy in the CAA, including Representative Harley O. Staggers[3] and Representative William L. Springer.[4]

In 1974, EPA created the NSR program, by regulatory fiat.[5] Congress codified this program in 1977, incorporating in the process the NSPS definition of "modification." *See, e.g.*, 42 U.S.C. § 7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).

As with other CAA decisions described herein, this was a deliberate act. By incorporating the NSPS modification definition into the NSR program, Congress ensured that

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[3] "The enforcement of air pollution regulations is partly the responsibility of the States and partly that of the Federal Government. The [1970 amendment] provides that the Federal Government shall have primary responsibility for the enforcement of performance standards for new stationary sources and hazardous emissions from stationary sources. The States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources." 116 Cong. Rec. 42, 520 (1970).

[4] Springer noted during the floor debates that NSPS was a "departure" from the ordinary division of responsibility, but that the departure was "sensible" because "[s]topping these extraordinary problems before they develop is best for the antipollution effort and it is also best for those who would build such installations and then find they could not operate." 116 Cong. Rec. 19,206 (1970).

[5] EPA established the Prevention of Significant Deterioration ("PSD") component in 1974 for sources located in attainment areas, *see* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974), and the non-attainment sources were subjected to NSR through a 1976 EPA rule, *see* Requirements for Preparation, Adaption [sic], and Submittal of Implementation Plans: Air Quality Standards; Interpretive Ruling, 41 Fed. Reg. 55,524 (Dec. 21, 1976).

existing sources traditionally addressed at the State level became subject to federal requirements to install new pollution control equipment only when projects at these sources increased their capacity to emit pollutants—which is the clear threshold for becoming a "new source" of pollution.

It was for these reasons that Congress never described NSR as a program to decrease emissions from existing sources. Despite its current litigation posture, EPA agrees—recently declaring that to interpret the Clean Air Act to "ensure that all major facilities eventually trigger NSR cannot be squared with the plain language of the Clean Air Act." Prevention of Significant Deterioration (PSD) and Non Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,273 (Oct. 27, 2003).

Similarly, EPA also acknowledges Congress' view that SIPs, not NSR programs, were the primary vehicle for obtaining emissions reductions: "Rather than NSR, the Act's primary mechanisms for achieving the emission reductions needed to attain or maintain NAAQS are State Implementation Plans." Brief of the Envtl. Prot. Agency 75, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

2. *Controlling Existing Sources.*

Beginning in 1970, Congress also emphasized the distinction between its approaches to regulating new and existing sources by repeatedly considering and rejecting schemes to impose on existing sources the mandatory control technology required of new sources. For example, in 1970, Congress considered and rejected imposing NSPS requirements on existing emissions sources covered by the SIP limits. *See* S. Rep. No. 91-1196, at 15-16 (1970).

Then, during debate over the 1977 Clean Air Act Amendments Congress again specifically rejected attempts to impose

universal retrofitting of all existing major stationary sources. *See* H.R. Rep. No. 95-294, at 185 (1977):

> Building control technology into new plants at time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached. For example, testimony from the electric utility industry indicates that it costs about 25 percent less to purchase and install flue gas desulfurization technology on a new plant than it would cost to retrofit that plant subsequently.

Congress' reasoning is inescapable: requiring NSR and the installation of advanced pollution controls would be prohibitively expensive for existing sources. Congress therefore rejected using the blanket approach of across-the-board, technology-forcing regulation for existing sources, favoring instead narrowly tailored, State-administered schemes to achieve emission reductions from existing sources. *See, e.g.*, 42 U.S.C. §§ 7491(b)(2)(A) (providing for "best available retrofit technology" for a limited class of existing facilities), 7502(c) (providing for "reasonably available control technology" ("RACT") for certain existing facilities in non-attainment areas). In this regard, the mandatory RACT requirement was limited to helping provide for the aforementioned "reasonable further progress" ("RFP") to ensure "attainment of the applicable [NAAQS] by the applicable date." 42 U.S.C. § 7501(1).

Congress certainly would have seen such a detailed scheme for existing sources as unnecessary if it had already required, as Petitioners suggest, that NSR mandate eventual universal retrofitting of advanced pollution controls on all existing facilities.[6] Indeed, further betraying this interpretation is that

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[6] As explained in both the utility and industry *amici* briefs, the types of projects that Petitioners contend trigger NSR are similar to projects undertaken every year across industry by every industrial facility merely to maintain the ability to operate as constructed and permitted to operate.

universal application of new source control technology contradicts Congress' express belief that such retrofitting would be unnecessary because of other targeted, existing source-level controls. As made clear by the principal architect of the 1977 Clean Air Act Amendments, Senator Edmund Muskie: "It is [Congress'] intent that 'reasonable further progress' means pollution control will reduce emissions at a rate that will lead to attainment of the ambient standards in the time required." 123 Cong. Rec. 18,019 (1977); Environmental Policy Division (1978), Library of Congress, 95th Cong., 2nd Sess., A Legislative History of the Clean Air Act Amendments of 1977: a Continuation of the Clean Air Act Amendments of 1970 (1978), Washington, DC: US Senate Committee on Environment and Public Works Print. Accordingly, the RFP requirements, including RACT-level controls, were intended to attain the NAAQS without additional reductions secured through the non-attainment NSR program.

This pattern continued during the 1980s when Congress repeatedly considered and rejected legislative proposals to impose, on existing coal-fired boilers, the choice between retrofitting with new source control technologies and shutting down. *See* S.321, 100th Cong. (1987); S.316, 100th Cong. (1987); S.300, 100th Cong. (1987); S.2813, 99th Cong. (1986); S.2203, 99th Cong. (1986); S.2200, 99th Cong. (1986); H.R.4567, 99th Cong. (1986); S.52, 99th Cong. (1985); H.R.5555, 97th Cong. (1982). That Congress bothered considering these sector-specific bills reveals its understanding that all existing facilities do not ultimately trigger NSR. Rejecting the proposals only affirms Congress' intent that ultimate NSR coverage of all industrial facilities

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If one accepts at face value the complaints filed by citizen groups and the Government in the NSR enforcement initiative, every individual industrial facility in this country has routinely triggered NSR preconstruction permitting under the NSR program year after year since 1980.

could not be the case. The present EPA NSR enforcement initiative implausibly assumes that the entire electric utility industry, refining industry, and much of the American Industrial sector were for decades all in massive non-compliance with existing regulatory requirements. That Congress engaged in the major 1977 and 1990 rewrites of the Clean Air Act without taking notice of such an anomaly, were it real, only further exposes the unsupportable nature of EPA's litigation position.

In sum, the history of the Clean Air Act prior to its 1990 Amendments manifests serial congressional rejection of Petitioners' preferred "retrofit or shut down" mandate to control emissions from existing sources. Instead, Congress left decisions regarding existing-source pollution primarily to the States and reserved authority to EPA only in limited areas consistent with the statutory hierarchy, explicitly avoiding the massive economic disruption that would follow from a heavy-handed, top-down approach to controlling pollution from existing sources.[7]

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[7] In fact, EPA had the same understanding when it included the reconstruction provision in the NSPS rules. Reconstruction is an exception to the requirement that an emissions increase triggers NSPS for an existing unit. When an existing unit expends 50% or more of the cost of a comparable entirely new facility, then that expenditure triggers application of NSPS. This is because EPA, like Congress, understood new source controls rarely apply to existing sources, and thus only required retrofitting new source controls when creating new and unregulated pollution or spending so much on an old facility that it becomes in essence a new facility. 40 Fed. Reg. 58,416 (Dec. 16, 1975) (final rule); 39 Fed. Reg. 36,946 (Oct. 15, 1974) (proposed rule), *id.* at 36,948 ("The purpose of this proposed [reconstruction] provision is to discourage the perpetuation of a facility, instead of replacing it at the end of its useful life with a newly constructed facility.").

3. *NSR was deliberately designed to address growth.*

Though it repeatedly confirmed that mandatory new source pollution control retrofits from existing sources was not the law, Congress did stake out a deliberate role in the overall Clean Air Act scheme for EPA's regulatory PSD and NNSR programs. The 1977 Clean Air Act Amendments established a PSD "increment" program managing growth in areas meeting air quality standards to ensure that air quality did not significantly deteriorate. *See* 42 U.S.C. § 7470 (PSD program is intended "to protect health and public welfare from any actual or potential adverse effects . . . notwithstanding attainment," while ensuring that economic growth "will occur in a manner consistent with the preservation of existing clean air resources.") As EPA recently explained, "the NSR program is a growth measure and is not specifically designed to produce emission reductions. Instead, its purpose is to allow new source growth to occur without interfering with an area's ability to attain." Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard, 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004).

NSR's focus on new emissions growth, and not on increased utilization of existing permitted emissions capacity, reflects Congress' balancing of economic and environmental concerns. The Clean Air Act repeatedly took care to note its goal, in addition to protecting and improving the nation's air quality, of regulating in a fashion that is protective of the American economy. 42 U.S.C. § 7401(b)(1). The purpose of the 1977 Amendments, which included the NSR provisions, was to "insure the protection of the public health and the environment . . . while at the same time considering the energy and economic needs of this Nation." H.R. Rep. No. 95-294, at 34-35 (1977). With respect to the PSD program itself, Congress declared that the occurrence of economic growth is among the purposes of the PSD provisions in the

Clean Air Act. 42 U.S.C. § 7470(3). Petitioners ignore these express considerations by predicating mandatory retrofit of new source control technology on the act of performing maintenance on existing productive capacity. Thus, while Petitioners cite the Act's purpose in their attempt to support the need to interpret "modification" differently in NSPS and PSD, they conveniently avoid citing, and ignore invoking the entirety of, the Act's stated purpose.

4. *In the 1990 CAA Amendments, Congress reaffirmed previous regulatory choices, and strengthened controls on existing sources, without altering NSR's role in the hierarchy.*

The 1990 Clean Air Act Amendments further affirm that NSR does not mandate all existing units eventually to retrofit mandatory new source control technology, and that NSR does not apply when existing power plants undertake activities not changing their original design capacity, even if those activities extend the source's productive life.

A major objective of the 1990 Clean Air Act Amendments was to mitigate potential environmental damage from acid rain. The major pollutants implicated in acid rain are sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"). Consequently, Congress required massive reductions in SO_2 and NO_x emissions. When considering potential control tools, Congress understood that electric utilities were never subject to the NSPS or NSR programs were undergoing refurbishment and life extension work, that they would be operated without new source pollution controls beyond 2010, and that their longer operating lives and increased utilization would cause a steady rise in national emissions in compliance with extant Clean Air Act permits and regulations. *See* 42 U.S.C. §§ 7651(a)(28)-(29), 7651(b).

Congress nonetheless elected against requiring each existing power plant to retrofit new source pollution control

equipment, favoring instead a national cap-and-trade regime designed to reduce SO_2 emissions much more efficiently and at much lower cost than by mandating uniform technology. Congress also achieved a reduction in NO_x emissions of approximately two million tons under Title IV, and addressed the long-range transport of NO_x. 42 U.S.C. § 7651(b). These provisions, not NSR, were designed to generate massive reductions in air pollution from existing sources. Unlike applying NSR to existing facilities, the Title IV acid rain program did so with economic efficiency, and deliberately so.

Congress' decision to create the Title IV acid rain program is important for three reasons. First, it shows yet again Congress' understanding that NSR is not triggered when existing facilities undergo life extension projects allowing them to operate within existing, regulated capacity. Second, Title IV demonstrates that Congress deliberately avoided requiring universal retrofitting of new source pollution controls on existing coal-fired facilities. Third, Congress pioneered the use of "market-based" tools (cap-and-trade) rather than command-and-control measures (such as NSR), for the explicit purpose of striking a balance between pollution abatement and economic prosperity. These assumptions underlying the 1990 Amendments regarding power plant operation, and the very cap-and-trade mechanism that Congress created in this legislation, belie claims that NSR required all existing units to "retrofit or shut down."

C. Grandfathering in the Clean Air Act; Congress did not play Petitioners' argued "expectations" game.

Despite ample opportunity, particularly including during significant amendment of the Clean Air Act, at no time between 1970 and 1990 did Congress statutorily mandate immediate reductions in air emissions from existing facilities, exempt sources entirely from the need to reduce emissions, or

impose pollution cuts on existing sources after "grandfathering" them for some limited period of time.

In instances where Congress instituted limited "grandfathering," the relevant statutory language does not require mystical divining of an unwritten reality. Instead Congress spoke clearly and unambiguously to the issue. For example, the 1970 Clean Air Act Amendments provided a 90-day grace period for existing sources to bring their emissions of Hazardous Air Pollutants ("HAPs") to within prescribed limits. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685-86 (1970) (enacting 42 U.S.C. § 7412); *see also* 116 Cong. Rec. 33115 (1970) (statement of Senator Prouty: "An innovative feature of the [1970] bill, in keeping with the urgency of the problem, is the establishment of definite deadlines.") Likewise, section 112, as revised by the 1990 Amendments, gives existing sources three years to comply with the Maximum Available Control Technology for air toxics. 42 U.S.C. § 7412(i)(3).

Instead of a definite time-measured mandate, the Clean Air Act trigger for subjecting existing sources to NSR, a source triggers NSR when and if it undertakes activity that creates, *new*, heretofore unregulated, pollution.

Petitioners argue that the NSR program mandates some unspecified grandfathering that eventually forces all sources into NSR. This confuses an expectation—that some number of existing sources might eventually be replaced with new sources—with a statutory mandate ultimately compelling installation of advanced controls on all existing sources. Manifesting this confusion is Petitioners' misplaced reliance on a passage from the House report on the 1977 amendments quoting an industry representative's statement to the effect that "[p]roven FGD [flue gas desulfurization] systems are justified for new plants utilizing higher sulfur fuel where sizable emission reductions are needed to meet new source performance standards. * * * [I]t is imprudent to backfit

FGD into existing plants, especially older units facing retirement within 10-15 years." This remark apparently serves as a rhetorical "forehead of Zeus" from which purportedly springs a fully-formed statutory requirement. Certainly Congress would make such a significant policy decision in a more direct and explicit way.[8] Yet even a cursory examination of the quoted passage reveals that the "10-15 years" reference is not a limitation on the universe of existing plants for which backfitting FGD would be imprudent. It is simply a specific illustration—a subset of the universe of existing units for which such backfitting would be "especially" imprudent.

Such practical considerations aside, what this report actually says is that some Members of Congress may have expected that some existing power plants would be retired and new ones constructed. And this indeed has occurred. It certainly does not, however, indicate that Congress has adopted statutory language designed to compel this outcome. Building upon this misconstruction of the 1977 CAA Amendments' legislative history, Petitioners proceed to torture the relevant case law in their attempt to make it confess cooperation with Petitioners' argument. For example, Petitioners attempt to liberate the D.C. Circuit opinion in *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979)—which actually described the 1977 Clean Air Act

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[8] Amici Waxman, *et al.*, particularly elevate this remark (Amici Waxman, *et al.* Brief at p. 21) stating, "Congress's decision to allow these sources to continue operating without NSR controls was based on the expectation that many 'older units fac[e] retirement in 10-15 years,' meaning that they would have to be refurbished—and controlled—if they were to continue operating." Certainly Congressman Waxman appreciates the nature of estimates. See, *e.g.*, Cong. Waxman letter to Congressional leadership reminding that estimates offered to and/or relied upon by government are just that and can prove to be conservative (in the context of the Department of Homeland Security cost estimates), at http://www.democrats.reform.house.gov/Documents/20040827140714-65532.pdf.

Amendments as intending to "grandfather existing Industries," but not create a "perpetual immunity from all standards, under the PSD program"—from its long-understood meaning and scope to now stand for a proposition that the court never addressed, specifically, that increasing pollution for PSD purposes means something more than increasing the capacity of the facility to emit. In *Alabama Power*, no party challenged the provision of the 1978 PSD rules requiring an increase in the "potential emission rate" of a source for there to be a "modification." Thus, the *Alabama Power* court's explanation that "Congress wished to apply the permit process . . . only where industrial changes might increase pollution," and its related observation regarding "perpetual immunity," merely recognize that existing sources become subject to NSPS and PSD when they undertake §111 modifications.

Similarly, statements by the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly,* expressing concern over opening "vistas of indefinite immunity from the provisions of NSPS and PSD," must be read in the context of the Circuit's rejection of *Wisconsin Electric Power*'s rather bold argument that "massive" and "unprecedented" projects, enabling facilities to increase their hourly emitting *capacity* by up to 40 percent, were routine maintenance that failed to trigger NSR. 893 F.2d 901, 909-10 (7th Cir. 1990).

II. THE NEW SOURCE PROGRAMS MODIFICATION RULE APPLIES ONLY TO EXISTING SOURCE CHANGES THAT CREATE NEW AND UNREGULATED POLLUTION.

The definition of "modification," which is the trigger for every new source program in the Clean Air Act, reflects Congress' deliberate and fundamental policy distinction between regulation of new sources of pollution and existing

sources of pollution. This understanding has been a central feature of the Clean Air Act since 1970.

A. The Modification Rule focuses on new emissions capacity.

The New Source Programs modification rule arises from the 1970 Clean Air Act Amendments and the NSPS program they created. At that time, Congress required review of "modification" for reconstruction as well as "construction" activities because both can create new capacity to emit. H.R. Rep. No. 91-1146, at 10 (1970) ("[N]ew sources may take the form either of entirely new facilities or expanded or modified facilities. . . ."). The Clean Air Act defines "modification" as any physical or operational change "which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). Accordingly, the "modification" definition from its inception focused on activity creating new (*i.e.*, unregulated) emissions, and until this enforcement was initiated, EPA never interpreted the term "modification" to the contrary.

It is inarguable from the text and structure of the 1977 Amendments that Congress carried over this NSPS meaning of "modification" to the NSR program. *See, e.g.*, 42 U.S.C. § 7501(4). The legislative history of the 1977 amendments confirms that Congress focused NSR on new emissions—not on the use or maintenance of existing facilities and their already-regulated emissions capacity. S. Rep. No. 95-127, at 55 (1977) (Congress determined that "some mechanism [was] needed to assure that before *new and expanded* facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards.") (emphasis added); *see* 123 Cong. Rec. 18,021 (1977) (Senator Muskie, one sponsor of the 1977 Clean Air Act Amendments, noted that the NSR procedures "apply only to new major emitting facilities and

do not affect existing facilities"); S. Rep. No. 95-127, at 29 (1977); *see also* 123 Cong. Rec. 18,040 (1977) (statement of Senator Randolph) ("[T]he nondeterioration section [PSD] applies only to major new emission sources. It does not relate to sources already in existence.").

As illustrated, *supra*, as part of the SIP process, States review and regulate emissions capacity from their resident sources. So long as the SIP assessment of the regulated emissions capacity of a source is not disturbed, air quality remains protected no matter how many hours the source operates or what physical changes are made to enable it to continue such operation. Congress specifically intended the term "modification" to encompass only activity that increases the capacity of a facility to emit—not the use of existing capacity as constructed and permitted, recognizing the redundancy inherent in reviewing these sources again unless the source is changed in a way that creates new, heretofore unregulated emissions. *See Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 298 (1st Cir. 1989) ("[T]he statute refers to the '*construction*' of facilities, not to *increased use of existing facilities*.").

B. NSPS and NSR are closely related programs sharing common features, including the same definition of "Modification."

1. *Congress deliberately defined NSR modification by reference to NSPS modification.*

Far from scrapping the NSPS model and beginning anew when crafting NSR, Congress instead modeled the statutory NSR program after EPA's 1974 regulatory PSD program, in which EPA defined "modification" precisely as in the NSPS program, emphasizing the Administrator's intent for "the definition of modification under Part 52 [addressing PSD] to be consistent with the final definition of this term under

Part 60 [governing the NSPS program]." *See* 39 Fed. Reg. at 42,513 (Dec. 5, 1974).

In 1977, Congress codified the NSR program, incorporating the NSPS definition of modification into the NSR definition. *See, e.g.*, 42 U.S.C. §7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).[9]

That Congress expressly incorporated the NSPS definition into the statutory NSR program is not simply a case in which two related programs, in the same Act, have identical words that should normally be given the same meaning. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Here, Congress expected that NSR review would occur in conjunction with NSPS review and that the process would be much the same. H. Rep. No. 95-294, at 144-45 (1977). This was also a major concern for EPA when creating the regulatory PSD program. *See* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,512 (Dec. 5, 1974). Appropriately, EPA itself has recognized the close ties between the NSPS and NSR programs. 68 Fed. Reg. 61248, 61268 (Oct. 27, 2003)

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[9] Congress codified EPA's regulatory program in the 1977 amendments with some alterations, for instance, strengthening the statutory NSR program's control technology requirements from those required by EPA in the regulatory program, reflecting the concern expressed at the time by Senator Muskie that there existed a "gap" between "actual best available technology and what has been required under new source performance standards." 123 Cong. Rec. 18,022. Senator Muskie's statement, that "the record to date under the [NSPS] approach has been disappointing," 123 Cong. Rec. 18,022 (June 8, 1977) (quoted in Pets. Br. 5), specifically referred to the difference in "control" technology between BACT and NSPS, not to the scope of applicability of NSPS or PSD to activities at existing facilities. *See id.*; *see also id.* at 18,018 (The new NNSR provisions "establish controls more stringent than the [pre-existing NNSR] ruling by EPA.") (emphasis added).

("The NSR program's scope is closely related to the scope of the NSPS program."). In fact, given the explicit cross-incorporation between the PSD and NSPS definition, the *application* of NSPS and "major modification" review under NSR should be identical. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005).

Here, Congress once again acted deliberately, incorporating by reference to an existing term having a recognized, accepted meaning. Congress failed to qualify "mean the same as" with, for example, "but only for statutory purposes, not for regulatory implementation purposes at which point its meaning may be as the Agency decides." Such qualification is precisely what the court in *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. 2006) would read into the statute.

2. *NSPS and NSR share overlapping regulatory goals.*

Unable to find support for their position in the statutory language, Petitioners argue that the NSPS and PSD programs have fundamentally different purposes requiring that coverage of projects undertaken at existing facilities be broader under the PSD program than under the NSPS program. Specifically, they argue that because the PSD program is an "ambient-based" program, whereas NSPS is a "technology-based" program, preconstruction permit coverage must be coterminous with the activities that consume the PSD "increments." These claims are specious.

Petitioners' argument fundamentally ignores that, starting with the 1970 CAA, both technology requirements and ambient-based preconstruction review were triggered by NSPS "modification" activities. Specifically, under the 1970 Act, preconstruction review to ensure compliance with the NAAQS was triggered by NSPS "modification," 42 U.S.C. §§ 7410(a)(2)(D), (a)(4), that being activity that created new pollution. By contrast, preconstruction review was *not*

triggered by existing emissions already reviewed and regulated under the SIP—like emissions resulting from increased hours of operation or from switches to an alternate fuel that the source was designed to accommodate. In other words, like nearly everything else in the Clean Air Act regulatory scheme, the decision to exclude these changes from the definition of "modification" under the 1970 Act emerges as a deliberate decision in the context of a regulatory regime where SIPs regulate emissions from existing sources at full capacity to ensure attainment and maintenance of the NAAQS. Under this regime, because all pollution up to an NSPS "modification" would be fully accounted for in the SIP, variations in operation of existing capacity would not trigger preconstruction review (as EPA made clear in its early regulations defining modification for NSPS and PSD), while "new pollution" that had not been reviewed would have to undergo review to assure "attainment and maintenance" of NAAQS.[10]

Furthermore, arguments seeking to defeat Congress' instruction that "'modifications' and 'modified' mean the same as the term 'modification' *as used in* [the NSPS program]," by extrapolating different meanings between the terms through touting differing purposes of the PSD and NSPS programs, also ignore the fact that some activities that could cause NAAQS exceedances or consume the PSD "increment" are not, and have never been, regulated under the preconstruction permit programs. For instance, Petitioners suggest that because the "baseline" for increment consumption accounting purposes in PSD areas is based on an area's air quality, any activity that increases "actual emissions" and

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[10] For such reasons, in its preamble of the 1980 Rules, EPA articulated disagreement with commenting parties that had argued the focus of NSPS was based solely on technology, explaining that "the decision to develop the NSPS is clearly based on ambient air quality concerns." 45 Fed. Reg. at 52,691-92 (Aug. 7, 1980).

potentially affects the air quality must necessarily trigger PSD preconstruction review. Pets. Br. at 40-41. This is incorrect.

Petitioners' view conflates "baseline" for purposes of increment accounting, which is the date of the first PSD permit application filed in a PSD area, *see* 42 U.S.C. § 7479(4) ("[t]he term 'baseline concentration] means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part"), with "baseline" for applicability purposes (*i.e.*, for determining whether a particular activity increased emissions and thus was a "modification"), which is a period shortly before the activity, see, *e.g.*, 40 C.F.R. § 52.21(d)(21)(ii) (establishing as a baseline date "a two-year period which precedes the particular date and which is representative of normal source operations'). These two dates can be separated by years—indeed, decades, for projects conducted in the late 1980s through 2000, as is the case here—and thus bear no relationship to each other.

Moreover, even where a correspondence between the two exists, Petitioners' argument proves too much. As recognized in *Alabama Power v. Costle*, a fuel switch to a higher-emitting fuel allowed under a facility's permit potentially consumes increment, but has always been excluded from PSD review. 636 F.2d at 378. In the court's own words, this argument "conflates the different yet complementary functions of [pre-construction] review and calculation of increment consumption." *Id.* EPA's longstanding definition of "modification" in both its NSPS and NSR programs has excluded from the definition increased hours of operation within permitted capacity. 40 C.F.R. §§ 51.166(b)(2)(iii); 60.14(e)(3). Yet, under Petitioners' reasoning *every* exclusion under the PSD rules (fuel switch, production rate, hours of operations, *etc.*) would be illegal, since every exclusion necessarily describes activity that potentially consumes incre-

ment but that is not subject to pre-construction review. This cannot be correct.[11]

Arguments about the ostensibly different purposes of the NSPS and PSD programs ignore the fact that, like the NSPS program, the PSD program is both technology-based and ambient-based. As discussed above, the 1970 Clean Air Act Amendments combined a technology-based NSPS program, *see* 42 U.S.C. § 7411, and an ambient, NAAQS-based "pre-construction" program, *see* 42 U.S.C. § 7410(a)(4), with the same trigger for projects at existing facilities—an NSPS "modification." Under the 1974 PSD program, a "technology-based" program requiring installation or the best available control technology ("BACT") and an "ambient-based" program designed to protect "PSD increments" in attainment areas were merged in one PSD program. In this program, the permits required that new emissions capacity comply with BACT, NAAQS and the PSD increment program.

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[11] EPA recognized as much, again in the 1980 Rules preamble, discussing how States can should address this issue: First, noting that the increments must be protected separately from any pre-construction requirements, EPA explained that the State must periodically review air quality and take "corrective action" if the increments are exceeded. This is one of the aspects of the PSD programs that Congress specifically "tightened" in 1977. *See Alabama Power v. Costle*, 636 F.2d at 361-64. Under the 1974 PSD rules, there was no requirement (or authority) to take action to protect the increments if they are exceeded due to "non-modification" activity (*e.g.*, fuel switch). 45 Fed. Reg. at 52,677 (Aug. 7, 1980). Second, EPA explained that States could "revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions." *Id.* at 52,721-22. If the State does the latter—*i.e.*, revise a source's permit to limit hours of operations, as the example in the preamble posits, *see id.* at 52,705—any increase in hours in excess of an enforceable permit limit, whether made possible by maintenance work or not, would trigger PSD. If the permit does not restrict hours, however, there is no basis in the regulations, or in logic, to differentiate between the two types of increases in hours of operation of the existing unit.

CONCLUSION

Electric utility operations routinely fluctuate, by the hour, day, month, and year. This is due to variable demand driven by many factors including the weather, economic health, and the availability of other units on the system. Utilities are legally obligated to keep their units in good repair to respond to the market's fluctuations. They are issued permits that do not limit their operating hours, enabling them to meet these obligations.[12] To ensure that these fluctuating source-specific emissions do not interfere with attainment or maintenance of the NAAQS, State regulators at the technical air quality planning level issue permits to utility sources that either reflect a specific emission limit or assume round-the-clock operations, and translate the relevant pollution numbers into the overall States' attainment and maintenance plans.

At the more basic level, this approach to air quality planning reflects the fundamental distinction between existing source pollution, which is fully accounted for and subjected to a NAAQS compliance-driven level of control, and green-field units and modified sources creating "new" pollution. The Clean Air Act's language and history make clear that the NSR and NSPS programs were always intended by Congress to address and apply to this *new* pollution (emissions from new sources). Old pollution (emissions from existing sources), no matter how it fluctuates within the universe of emissions generated by existing sources, is controlled by other (*i.e.*, non-NSR) Clean Air Act programs. In their pursuit of a major policy shift serially rejected by Congress,

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[12] EPA has consistently recognized that Congress did not intend to regulate such fluctuations. *See* 68 Fed. Reg. 61,253 (Oct. 27, 2003). ("[A]pplication of the major NSR program to 'modified' plants is [not] designed to require existing plants that are continuing to operate in a manner consistent with their original design to curtail their rate of production or hours of operation beyond limitations set forth in their existing permits."); *see also* 45 Fed.Reg. 52,704 (Aug. 7, 1980).

Petitioners make "grace period" or "grandfathering" arguments and other similar claims that fundamentally misstate and misconstrue all of the major policy choices made by Congress throughout the entire life of the Clean Air Act.

In turn, the common definition of "modification," to be applied in the context of the NSR and NSPS programs, was developed in response to, and is driven both by these overarching regulatory policy imperatives and by Congress' decision to regulate old and new pollution in fundamentally different ways. Petitioners indicate that failure to adopt their desired policy shift will result in a policy hole in America's air pollution regulations. To the contrary, revising the definition "of modification" along the lines suggested by the Petitioners so as to apply NSR to the fluctuating emissions of already-regulated pollution would defeat congressional intent and effectively emasculate the non-NSR Clean Air Act programs. The Court should refuse to indulge in such a fundamental re-write of one of this nation's most important and carefully balanced regulatory statutes.

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